Supreme Court U.S.
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No. ____
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IN THE

Supreme Court of the United States

JANELL S. HARPER,

Petitioner,

v.

STATE OF ALABAMA PERSONNEL BOARD; HALYCON v. BALLARD, individually, THOMAS G. FLOWERS, in his official capacity as Director of Personnel; ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS; and NICK D. BAILEY, in his official capacity as Director of the Alabama Department of Economic and Community Affairs,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ALVIN T. PRESTWOOD *
PRESTWOOD & DICKEY, LLC
350 Adams Avenue
Post Office Box 1910
Montgomery, Alabama 36102
(334) 264-6401

* Counsel of Record

Attorney of the Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

38 pp

QUESTIONS PRESENTED FOR REVIEW

1. May a district court deny relief to one who has been discriminated against in the workplace because of her gender, when the sole basis for the denial is a prior court order creating an affirmative action plan to prevent racial discrimination?

2. Must a district court deny the relief mentioned in paragraph 1 in spite of the availability of alternatives that do not conflict with a court order creating an affirmative action plan to prevent racial discrimination?

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with the Supreme Court Rule 14(b), Petitioner represents to the Honorable Court that the parties to this Petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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IN THE

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STATE OF ALABAMA PERSONNEL BOARD; HALYCON V. BALLARD, individually, THOMAS G. FLOWERS, in his official capacity as Director of Personnel; ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS; and NICK D. BAILEY, in his official capacity as Director of the Alabama Department of Economic and Community Affairs.

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Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The unpublished decision of the Untied States Court of Appeals for the Eleventh Circuit was entered on July 24, 2002(APP. B, p. 3a), and the order denying rehearing and rehearing en banc was entered on October 4, 2002(APP. A, p. 1a). The unpublished decision of the United States District Court for the Middle District of Alabama was entered on May 8, 2001(APP. D, p. 13a; E, p. 14a), and that court denied a motion to alter, amend, or vacate its final judgment on June 5,

2001 (APP. C, p. 11a). Interim orders of the trial court were entered on January 31, 2002(APP. G, p. 21a), and February 2, 2002(APP. F, p. 19a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the Untied States Court of Appeals for the Eleventh Circuit being reviewed is dated July 24, 2002 (APP. B,-p. 3a) and the rehearing and rehearing en banc decision is dated October 4, 2002 (APP. A, p. 1a).

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. §1254(1). Rule 10(a) of the Rules of the Supreme Court of the United States provides for review of a United States Court of Appeals decision when a United States Court of Appeals decision has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Rule 10(c) also provides for review in this Court of decisions of the Courts of Appeals that have decided an important question of federal law that has not been, but should be, settled by this Court.

This case involves questions within those standards, because the issues are whether gender discrimination may be condoned in order to promote nondiscrimination based upon race.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

The Plaintiff, JANELL S. HARPER, originally filed this lawsuit on February 9, 1994, (R1-1), and amended it effective on April 11, 1994. (R1-4). Jurisdiction was posited under 28 U.S.C. §§1331 and 1343.

The Complaint sought relief under the Equal Pay Act of 1963 (EPA), as amended, 29 U.S.C. § 206(d), under the equal protection clause of the Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 601-634, under the First Amendment to the United States Constitution, as enforced through 42 U.S.C. § 1983, and under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981a, 2000e through 2000e 17.

During the course of the proceedings, the Plaintiff conceded that she was not entitled to certain relief under several of her claims. (R2-62-2). The Plaintiff proceeded, however, under the theory that she was entitled to all forms of available relief against the two state agencies involved under the EPA and Title VII. (*Id.*) She also contended that she was entitled to relief under 42 U.S.C. § 1983 against the directors of the two agencies acting in their official capacities, for prospective injunctive relief, and that she was entitled to monetary damages against HALYCON VANCE BALLARD, individually, subject to the latters' claim of qualified immunity. (*Id.*).

After the case was reassigned to District Judge Myron Thompson on July 7, 1995, it essentially languished there until mandamus proceedings were brought in the Court of Appeals for the Eleventh Circuit to require Judge Thompson to act upon the case. (R2-42). When Judge Thompson began to set a schedule for the proceedings, (R2-36; 37), the Petition for a Writ of Mandamus was withdrawn on April 3, 2001. (R3-64).[1]

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[1] During the course of the proceedings, efforts were made by the Defendants to consolidate this case with *Exparte: Employment Discrimination Litigation* against the State of Alabama, CV-94-T-356-N, but those motions were denied by the Court on February 7, 1995, and again on September 20, 2000. (R1-18; 31).

The Plaintiff filed a renewed summary judgment motion on February 28, 2001, while the Defendants filed their summary judgment motions on that date and on March 19, 2001. (R2-46; 58). On May 8, 2001, the trial court entered an order granting the Defendants' motions for summary judgment (R3-81; 82). In so doing, the Court noted that the Plaintiff had established a *prima facie* case under the Equal Pay Act (R3-81-1), the Equal Protection Clause (R3-81-4), and Title VII (R3-81-8), and never indicated any doubt that her freedom of association interests were protected under the First Amendment. (R3-81-6, 7). In addressing the Defendants' responses, the trial court, in each instance, held that the Defendants' *sole* articulated reason for discrimination against the Plaintiff was that they "refused to reallocate plaintiff pursuant to the *Frazer* no-bypass rule". (R3-812, 4, 6 & 7).

After the final order was entered on May 8, 2001, the Plaintiff submitted a timely Rule 59 motion (R3-83) which was denied by the trial court on June 5, 2001. (R3-88).

In the course of entering orders preliminary to the final order, the trial court had strongly warned the Defendants that they should address the "important issue" presented here to the court in the *Frazer* litigation (R2-38). It had followed up that admonition in its order of February 2, 2001, by reiterating, "to the extent the no-bypass rule is implicated—for example by plaintiff's Equal Pay Act claim—this issue needs to be addressed in *Frazer* where all parties to that litigation can be heard." (R2-41-2). (Emphasis added). The Defendants unfortunately did not follow that advice, even though the trial court continued to admonish them to do so.

On July 24, 2002, a panel of the Eleventh Circuit Court of Appeals affirmed the district court's decision, and a petition for rehearing and rehearing en banc was denied on October 4, 2002. Jurisdiction of that appeal was posited under 28 U.S.C. § 1291.

II. STATEMENT OF THE FACTS.

The Plaintiff, JANell S. Harper, is a female state employee. (R1-29, attached affidavit, p. 1). From November 19, 1988 through November 7, 1997 (*Id.*, p. 6), she worked in a "Rapid Response" unit with Richard Jordan, a male counterpart "who performed the same duties and had the same responsibilities with the same or similar experience and qualifications". (*Id.*, p. 3). The Plaintiff in fact had superior qualifications and had been more productive than her male counterpart *Id.*), but was paid $59,918.40 less than her male counterpart for the relevant period. (*Id.*, p. 6).

In June of 1990, a register for the classification of Planning and Economic Development Specialist ("PED II") was established, which had not been updated at the time of this lawsuit. As an Administrative Assistant I ("AAI"), the Plaintiff was not eligible to be included on the PED II promotional register, but she was eligible for the open-competitive register of PED II. Jordan was given eligibility for both the open-competitive and promotional PED II registers. (*Id.*, p. 3).

Dr. Halycon V. Ballard, Director of Personnel, advised that the Plaintiff would remain in her unequal pay scale because she was not appointable to the pay scale equal to that used to pay her male co-worker, even though she could have been appointable from the AAII register, which would have included pay equal to her co-worker, and was tied in number 1 position on that register with others. The Plaintiff thereafter requested a desk audit of her position, and it was determined that the Plaintiff's job would be more appropriately allocated to the classification of PED II. (*Id.*).[2]

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[2] When the Personnel Department conducted the aforesaid desk audit, one important task, that of making public speaking engagements to various interested groups, was not recapped in the summary of the work performed. (*Id.*, p. 4).

On or about November 14, 1992, the Plaintiff's position was reallocated from AAI to that of PED I. She was recommended for the higher classification of PED II, on which she ranked 14 on the open-competitive register and her male co-worker ranked 26; nevertheless her ranking of 14 was considered too low and not reachable to be selected for promotion to PED II. (*Id.*).

After the reallocation of her position to that of PED I, the Plaintiff believed she should be eligible to be included on the promotional register of PED II when the next exam was given. She also believed that had she been promoted to PED II then she would have been eligible for the PED III register, which was a continuous register to which she could apply at any time. The Plaintiff contends that she should have been promoted to PED II on or before November of 1996. (*Id.*, p.5).

When discussing her unequal pay status with her supervisor, the Plaintiff had been subjected to numerous comments indicating that her supervisor was of the opinion that she did not need a pay increase because of her status as a married woman and because of her then husband's political affiliations. The Plaintiff therefore asserted that the Defendant's failure or refusal to place her in a pay classification equal to that of her male co-worker was based on her sex, marital status, and political affiliation. (*Id.*).

There were at least two viable routes that the Defendants could have taken to get the Plaintiff's pay on an approximate level with that of Richard Jordan without violating the *Frazer* "no-bypass" rule before the Plaintiff's transfer from the Rapid Response Section. (R3-69-Tab 1). First, her position could have been reallocated to AA II and her pay raised to comply

with the EPA requirements. Second, the position of AA I could have been made a "feeder" position in line for promotion to PED II, and the Plaintiff could have been placed upon a promotional register for the position of PED II.[3] Although she was on the PED II open competitive register, she was not high enough on it to be tied with black applicants above her. Promotional registers were, by their very nature, shorter than open competitive registers, and her chances of having her position reallocated to PED II would have been much greater if she had been placed on such a promotional register. Discrimination against females in state government in Alabama is not unusual. First, the Plaintiff came up through the clerical ranks of state service, having been classified as a Clerk IV upon being transferred to the Rapid Response Section in 1988. Positions designated as clerical classifications, such as those in the clerk series, have been lower-paid levels historically filled largely by a majority of females over males. The Plaintiffs' male counterpart, Richard Jordan, did not come up through those ranks, and was compensated at a higher level from the beginning of the time that he performed the same work and duties as the Plaintiff. (R2-62-Tab 5; R3-69-5, 8-9, 12).

[3] The AAII classification was indeed in a feeder position for promotion to PED III, and no explanation was given as to why AAI's could not be treated the same. (*Id.*, p. 3).

ARGUMENT[4] OF REASONS WHY CERTORRARI SHOULD ISSUE

A. The Equal Pay Act, Title VII, and the Equal Protection Clause.

In *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 594, (1926), the Supreme Court said:

> "[A state] may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

In the instant case, the state and the federal courts have essentially said to this female employee, "you may continue to work for the state upon the condition that you surrender your right to the Equal Protection of Laws by accepting considerably less pay than that of your male counterpart." The Appellant's position is that such treatment cannot be tolerated under prevailing constitutional and statutory principles.

For purposes of this appeal, the Appellees have conceded that this employee has established a prima facie case under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d)(1) (Appellee's brief, p. 15), under Title VII of the Equal Employment Opportunity Act of 1964, 42 U.S.C. § 2000e et seq., and

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[4] The reference herein to the "Appellees' brief" will be to the brief of the Alabama State Personnel Board filed in the Court of Appeals for the Eleventh Circuit, and the persons who served as Director of the Alabama State Personnel Department, who are sometimes referred to in that brief as the "Personnel Defendants". The other Appellees' brief, filed by the Alabama Department of Economic and Community Affairs and its Director, merely adopts the brief of the Personnel Defendants.

under the Equal Protection Clause of the Fourteenth Amendment. (Appellee's brief, p.18). That concession was made virtually necessary by the fact that this female employee worked for nine years with her male counterpart "who performed the same duties and had the same responsibilities with the same or similar experience and qualifications." (R1-29, attached affidavit, p.3). In fact, there is evidence that this female employee had superior qualifications and was more productive in her work then was her male counterpart (Id), but was paid about $59,918.00 less than he was paid over a nine-year period, or an average of about $6,657.00 per year less than he was paid. (R1-29, attached affidavit, p.6).

In their sole reason for upholding the disparate treatment of this female employee, the lower courts and the state officials point to the case of *United States v. Frazer*, 317 F. Supp. 1079, 1091 (M.D. Ala. 1970), and its so-called "no by-pass rule". That rule prohibits the appointment of a white candidate from a certificate of eligibles if there is a higher-ranking African-American candidate on that certificate. (R2-48-33, 34). The district court and the Court of Appeals have held that this "no by-pass" rule entirely insulates the Defendant from any requirement to treat this female employee on an equal basis with the treatment received by her male counterpart, because one of the methods to correct the differential would have required the officials to "by-pass" an African-American on one of the pertinent registers.

The employing entities first contended that reliance upon the rule in *Frazer* presents a complete defense under the EDA because it constitutes "a differential based on any factor other than sex" under 29 U.S.C. §206 (d)(1)(iv).[5]

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[5] The district court also noted that the Defendants did not violate the EPA because the challenged pay levels were applied pursuant to a "merit system" under 29 U.S.C. § 206 (d)(1)(ii) (R3-81-2, n.1). Neither the district court, nor the state officials in their brief, have contended that the

In *Morgado v. Birmingham-Jefferson County Civil Defense Corps*, 706, F.2d 1184, 1189 (11th Cir. 1983), cert. den., 464 U.S. 1045 (1984), the Eleventh Circuit held that an employer must show that "sex provides no part of the basis for the wage differential" in order to assert the defense of relying on "factors other than sex". Other circuit courts of appeal have rejected the argument that compliance with civil service laws precludes a finding of a violation of the EPA. See *Maxwell v. City of Tuscon*, 803 F.2d 444, 447 (9th Cir. 1986). *Marshall v. Kent State University*, 589 F.2d 255 (6th Cir. 1978).

Hiding behind the exception relied upon here is particularly onerous, because the state officials tacitly admit and the lower courts have recognized, that this female and her male counterpart were both working "out of classification", and were performing duties "not appropriate" for either of their classifications. (Appellees' brief, p.9). That admission virtually destroys the contention that the state actors could not adjust the practices they claimed prohibited them from avoiding unlawful discrimination. The Defendants should not be allowed to stand on discriminatory policy provisions that promote discrimination, and ignore the opportunity to adjust those policy provisions to eliminate disparate treatment.

As to the Title VII and the Equal Protection issues, there was proof that the Plaintiff was told directly by one of the state officials involved that she "did not need a pay increase because of [her] status as a married women and because of [her] then husband's political affiliations." (R2-62-Tab 1, attached affidavit, p. 5). When revealing that stated reason to

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"merit system" exception is any broader than the one involving "any factor other than sex". In *Margado v. Birmingham-Jefferson County Civil Defense Corps*, 706 F. 2d 1184, 1188 (11th Cir. 1983) cert. den. 464 U.S. 1045 (1984), the Eleventh Circuit rejected the merit system defense unless it presented a "means or order-'system'—of advancement or reward for merit." Because of that limitation in *Margado*, it is clear that the "merit system" defense would not apply here.

another state official, the Plaintiff was told that "you [still] have to buy your clothes , don't you, and all your personal needs." (R2-62-Tab 3, p. 460-461). Those comments constituted direct evidence of gender discrimination, and should be treated as such. See *Bass v. Board of County Commissioners,* 256 F. 3d 1095 (11th Cir. 2001). Other evidence of an indirect nature was addressed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 d (1973): *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Assuming that the proffering of the "no by-pass" rule satisfies the employers' duty to "articulate" a legitimate, non-discrimitory reason for their actions, that proffer does not end the inquiry. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court noted that a finder of fact could conclude unlawful discrimination from disbelief that the profferred reason was in fact the real reason for the disparate treatment.

In this case, the district court *twice* urged these Defendants to address this "*important issue*" presented here to the court in the *Frazer* case (R2-38-2: R2-41-2), which they declined to do, opting instead to stand on their position in spite of the court's admonitions. Although the trial court later summarily ignored its prior cautioning to the state officials, it is clear that such original concern was indeed genuine. The *Frazer* "no by-pass" rule was nothing more nor less than a court-imposed affirmative action plain, and affirmative action plans per se cannot excuse discrimatory actions. *Johnson, et al. v. Board of Regents of the University of Georgia*, 263 F. 3d 1234 (11th Cir. 2001). *Bass v. Board of County Commissioners*, 256 F. 3d 1095 (11th Cir. 2001).[6]

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[6] It is manifestly improper for a court to construe race discrimination statutory provisions in such a manner as to render "superfluous" the statutory prohibitions against gender discrimination. See *Hohn v. United States*, 524 U.S.236 (1998); *Vimar Seguros v. M/V Sky Reefer*, 515 U.S.528 (1995). Those cases clearly hold that courts should not construe

The evidence in this case clearly revealed that the Defendants could have avoided the wage disparity in two distinct ways, without violating the *Frazer* "no by-pass" rule. First, they could have promoted the Plaintiff to Administrative Assistant ("AA") II, since she was on the promotional register and reachable for appointment even under *Frazer* standards. Second, they could have provided that persons classified as Administrative Assistant ("AA") I (the Plaintiff's classification), were eligible for promotion to PED II, since they had already provided that persons classified as AA II's were eligible for promotion to the position of PED III.[7] On other occasions, state officials have resorted to similar methods to promote persons without offending the Frazer rule. (R2-62-Tab 1 and Tab 3, pp. 439 through 448).

At pages 26 through 28 of their brief before the Court of Appeals, the state officials argue that it would be improper to reallocate the Plaintiff's position to AA II, because that would "misclassify an employee in a classification that did not match her job duties" under the applicable merit system principles. (*Id.*, p.27). That argument wholly overlooks the fact that these officials have already perpetrated their discrimination by allowing both this female employee and her male counterpart to work in what they would call "mis-

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statutory provisions so as to render other statutory provisions "superfluous". That principle is, of course, nothing more than an extension of the rule that all provisions of statutes are to be given effect if that is possible.

[7] The State officials argue that this second alternative should not be considered because the Plaintiff's promotion possibilities under that theory would be contingent upon "speculation" and "conjecture". (See Appellee's brief, pp. 29-30). That attitude demonstrates the stoic position of the Defendants to reject any method that would correct the discrimination that is apparent here. The suggestion to allow AA I's to be promoted to PED II would have substantially enhanced Ms. Harper's chances for promotion to PED II. (R2-62, Tab 1, p.3).

classification"! In fact, the testimony showed only that the AA II position was not the "most appropriate" allocation for the position of this female employee and her male counterpart. (R2-62, Tab. 4, p. 44). The AA II classification is a general one that was, in practice, applied to positions holding a wide variety of duties. (*Id*, Tab 1, p.3). It was versatile enough, for example, to allow persons holding the position to be in "feeder" positions for promotion to PED III, while unexplainably denying persons classified as AA I's to be in "feeder" positions for promotion to PED II. (*Id.*)

This Court has dealt with a similar recalcitrance in the case of *Morgado v. Birmingham Jefferson County Civil Defense Corps, supra*, and has basically rejected the positions now espoused by these officials.

B. Freedom of Association and Qualified Immunity for Defendant Ballard.

The Freedom of Association claim involves the Plaintiff's association with her husband, and since she would not have had that association had she not been a female, the gender items previously discussed are relevant to the previous section. Also, Dr. Ballard's defense is that the established merit system policies, when superimposed upon the *Frazer* requirements, prevented her from accommodating the mandates of the EPA and of Title VII, as well as the constitutional restrictions involved in this case. (R2-48-Tab B). Ballard should long since have known, however, upon the 1983 release of *Morgado v. Birmingham Jefferson Count Civil Defense Corps, supra*, that blind adherence in the Eleventh Circuit to a merit system defense was not acceptable when explaining reasons for gender discrimination in wage matters. Those claims are not delved into here, because it is presumed that they are subsidiary issues to the disparate treatment claims already addressed, and that, if certiorari is

granted as to those other claims and the case is remanded, the remand will carry with it these issues of freedom of association and qualified immunity.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that a writ of certiorari should be issued in this case, and that the Court of Appeals should be directed to reverse and remand this case to the trial court with instructions to allow the case to proceed to trial. In the alternative, the trial court should be directed to grant the Plaintiff's motion for a partial summary judgement filed on February 28, 2001(R2-44), as supported by material filed by the Plaintiff in response to the Defendant's motion for summary judgment (R2-62; R2-69), and remand the remainder of the case to the trial court for further proceedings.

Respectfully submitted,

ALVIN T. PRESTWOOD *
PRESTWOOD & DICKEY, LLC
350 Adams Avenue
Post Office Box 1910
Montgomery, Alabama 36102
(334) 264-6401

* Counsel of Record

Attorney of the Appellant

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Oct. 4, 2002]

No. 01-13832-II

JANELL S. HARPER,
Plaintiff-Appellant,

versus

STATE OF ALABAMA PERSONNEL BOARD, HALYCON VANCE BALLARD, individually and in her official capacity as Director of the Alabama Department of Personnel, ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, DAVID HOOKS, in his official capacity as Director of the Alabama Department od Economic and Community Affairs,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: EDMONDSON, *Chief Judge*, CARNES and SILER,* *Circuit Judges*.

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* The Honorable Eugene E. Siler, Jr., U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. Edmondson
J. EDMONDSON
CHIEF JUDGE

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed July 24, 2002]

No. 01-13832

D.C. Docket No. 94-00154-CV-T-N

JANELL S. HARPER,
Plaintiff-Appellant,

versus

STATE OF ALABAMA PERSONNEL BOARD, *et al.*,
DefendantsAppellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before EDMONDSON, *Chief Judge*, CARNES and SILER,* *Circuit Judges*.

PER CURIAM:

The Plaintiff, Jannell S. Harper, filed this action in 1994, against the State of Alabama Personnel Board and the Alabama Department of Economic and Community Affairs (ADECA) (collectively, "Alabama" or the "State"). Also included as defendants were Halycon V. Ballard, the director

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* The Honorable Eugene E. Siler, Jr., U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

of the Personnel Board, and her successor, Thomas G. Flowers, as well as David Hooks, the Director of ADECA, and his successor, Nick D. Bailey, (collectively, the "Individual Defendants"). Harper alleges that the Defendants discriminated against her—based on her gender and her husband's political affiliations—by paying her less than a male counterpart performing the same duties. She invokes the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d); the Equal Protection Clause of the Fourteenth Amendment and the Freedom of Association Clause of the First Amendment to the United States Constitution, via 42 U.S.C. § 1983; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981a, 2000e. On appeal, Harper challenges the district court's grant of summary judgment based on the Defendants' articulated non-discriminatory rationales of compliance with the rules of its merit system and an order of the district court, coupled with Harper's failure to offer any proof of pretext. We affirm.

Harper's grievance concerns her employment with ADECA. She alleges that from November 19, 1988 till November 7, 1997, she worked with Richard Jordan, a male, "who performed the same duties and had the same responsibilities with the same or similar experience and qualifications," while receiving substantially more compensation. To understand Alabama's defense, it is necessary to consider its merit system, which controls the pay and appointment of government employees.

Pay for Alabama state employees is determined by grade. Grades of positions are determined by the Personnel Department's assessment of the functions of that position. Appointment to positions is governed by the state merit employment system. A register is established for each job classification, or grade, such as Administrative Assistant I ("AA I"), Harper's original grade. The register includes a list of names of all candidates for a particular classification in ranked order. There are two types of registers: an open competitive register

for those who meet the minimum qualifications of the classification regardless of whether they already hold a position within the merit system and a promotional register for those already within the merit system.

When an agency needs to fill a position, the Personnel Board forwards a list of ten names from either of the registers established for the classification. The agency is free to select anyone from the "certificate of eligibles" to fill the vacancy, subject to certain judicially mandated requirements, discussed *infra*.

As an agency adjusts the job duties and responsibilities of a particular position, the classification may no longer be appropriate. Reassignment of a position to another classification is called "reallocation." When an occupied position is reallocated upwards, the incumbent employee effectively receives a promotion. The merit system rules in place at the time permitted an agency to request that an incumbent employee be reallocated along with the position and receive that promotion, provided the employee ranked in the top 50% of any register established for the new classification.

The judicial requirements mentioned above relate to a civil rights court order under which Alabama's merit system still operates. In relevant part, that injunction provides:

> Defendants shall not appoint or offer a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable. In every instance where a determination is

> made that the Negro applicant is unfit or unavailable, documentary evidence shall be maintained by the defendants that will sustain that finding.

United States by Mitchell v. Frazer, 317 F. Supp. 1079, 1091 (M.D. Ala. 1970). Thus, agencies cannot hire lower ranking whites over higher ranking blacks, unless the higher ranking blacks are interviewed and deemed not qualified for the position. The court so enjoined Alabama as part of the remedy for the extensive past pattern and practice of racial discrimination in the hiring of state employees.

Harper held an AA I position with ADECA. In 1988, she was assigned to a new unit of ADECA, the Dislocated Worker Unit. She alleges that in this new unit she performed job duties similar to Jordan, the male "comparator." Jordan held a merit system classification of Employment Security Specialist II ("ESS II"). The duties of both positions correspond to the classification of Planning and Economic Development Specialist II ("PEDS II"). Alabama does not dispute that both Jordan and Harper were working "out of classification," *i.e.*, performing duties not appropriate for either classification. Harper, however, does not allege that the Defendants purposefully assigned her and Jordan to work out of classification.

In July 1992, ADECA requested that the Personnel Board reallocate Harper's position to AA II. Harper had asked that ADECA only request a reallocation to AA II because she knew that though she was on the register for the PEDS II classification, she was not above several qualified blacks on that register. Acting on this request, the Board performed a "desk audit" of Harper's position to assess her duties and verify AA II as the appropriate classification for the position. The Board determined that PEDS II, not AA II, was the appropriate classification. Thus, the Board denied the request

to reallocate Harper's position to AA II, as inappropriate, and Harper could not be promoted to PEDS II due to the *Frazer* injunction.

Harper was transferred to another position on November 7, 1997 and ceased performing the same work as the comparator. She further alleges that during discussions with her ADECA supervisor over the reallocation that she commented that Harper did not need the pay raise because her husband had political connections. Her late husband was allegedly a close friend and political ally of former Alabama Governor George C. Wallace. These comments form the entire basis for her freedom of association claim.

We review *de novo a* grant of summary judgment as a matter of law.

I.

Neither Alabama nor the Individual Defendants discriminated against Harper on account of her gender. Harper knew that after re-grading her position to PEDS II the State could not re-appoint her to it because doing so would put the State in violation of the *Frazer* injunction. The only potentially open question, then, is whether her rights are violated by Alabama's adherence to the terms of the *Frazer* injunction. We conclude that that question is not before the court.

II.

First, addressing the Individual Defendants, no individual liability could lie in this case. Qualified immunity protects the officials, as they violated no clearly established right, if any right at all.[1] The Individual Defendants merely applied the

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[1] "Qualified immunity protects government officials performing discretionary functions . . . from liability if their conduct violates no `clearly established statutory or constitutional rights of which a reasonable person would have known. " *Lassiter v. Alabama Adrvl Univ., Bd. of Trustees,* 28 F.3d 1146,1149 (11th Cir.1994) (en banc) (citation omitted). "Unless a government agent's act is so obviously wrong, in the light of pre-existing

merit system and directives of *Frazer*. Unquestionably, appointing Harper to the re-graded position would violate *Frazer by* promoting her over more qualified black applicants. Though EPA rights are clearly established so too are the Title VII rights against racial discrimination protected by the *Frazer* injunction. Moreover, it is not clearly established that officials should disregard an injunction by a United States District court.

III.

Concerning the State, the issue before the court is whether adhering to *Frazer* is justified when it may result in an EPA or Title VII gender discrimination violation. The simple answer is that it does not matter for purposes of this action. Alabama is acting under a federal injunction, which prohibits the relief that Harper requests. Under the *McDonnell Douglas* burden-shifting framework, Alabama has articulated compliance with its merit system and the *Frazer* injunction as non-discriminatory motives. Harper offers no evidence that such compliance with the *Frazer* injunction is pretextual, i.e., that it is routinely disregarded for male employees, or other such proof. Without any evidence of pretext, the district court appropriately granted summary judgment. This analysis disposes of the Plaintiff's Title VII and Equal Protection [2] claims.

Though a slightly different analysis applies to Harper's EPA claim, the result is the same. An EPA claimant must make *a prima facie* showing that the employer paid different wages to a member of the opposite sex for substantially equal

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law, that only a plainly incompetent *officer* or *one who* was knowingly violating the law would have done such a thing, the government actor has immunity from suit." *Id.*

[2] We evaluate Title VII and Equal Protection claims under § 1983 using the same *McDonnell Douglas* framework. *Bushy v. City of Orlando*, 931 F.2d 764, 777 (11th Cir.1991).

work. Once a *prima facie* case has been made, the employer then must establish one of the four statutory affirmative defenses to avoid liability. *See Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994). The Equal Pay Act excepts differentials in payments based either on a "merit system" or "based on any other factor other than sex," 29 U.S.C. § 206(d)(l)(ii), (iv), such as compliance with *Frazer.*

As for a direct challenge to *Frazer,* Harper did not raise this issue below until after the district court granted summary judgment. Accordingly, it is not before this court. In any event, a consideration of plain error reveals several analogous dispositions that support the district court's dismissal. For example, employers without court mandate may remedy a violation of Title VII by instituting an appropriate affirmative action plan, such as the court established in *Frazer. See United Steel Workers v. Weber*, 443 U.S. 193, 208, 99 S. Ct. 2721, 2729 (1979). The burden of challenging that plan is on the plaintiff:

> Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.

Johnson v. Transp. Agency, 480 U.S. 616, 626, 107 S. Ct. 1442, 1449 (1987). Harper offered no evidence that the application of the *Frazer* "plan" to her is pretextual, as discussed, or that the plan is invalid.

IV.

Finally, Harper's freedom of association claim, alleging discrimination based on her deceased husband's political affiliations, fails under the same reasoning as her other claims against Alabama. A public employee's freedom of association is burdened by adverse employment action if the protected association was a "substantial" or "motivating" factor in the employer's decision. *Mt. Healthy City Sch. Dist. Bd. of Educ.* V. *Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977); *Hatcher v. Bd. of Pub. Educ.*, 809 F.2d 1546, 1558 (11th Cir. 1987). Harper offers some alleged comments that Alabama was aware of her husband's affiliations, but she offers no evidence that compliance with the *Frazer* injunction was pretextual, implying freedom of association discrimination as the underlying purpose for her failure to receive the promotion. Therefore, this claim fails as well.

AFFIRMED.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

[Filed June 5, 2001]

CIVIL ACTION
No. 94-T-154-N

JANELL S. HARPER,

Plaintiff,

v.

STATE OF ALABAMA PERSONNEL BOARD, *et al.*,

Defendants.

ORDER

Upon consideration of the motion for rehearing, motion to alter, motion to amend, and motion to vacate, filed by plaintiff on May 18, 2001, it is ORDERED that all these motions are denied.

Plaintiff is essentially now attempting to mount a challenge to the *Frazer* rule. This attempt comes much too late, not only because summary judgment has been granted but also because of the overall posture of this case. Discovery has been completed, trial briefs have been filed, a pretrial order has been entered, and, but for the granting of summary judgment, this case was ready to go to trial. To allow plaintiff to mount a challenge to the *Frazer* rule now would require not only setting aside summary judgment but reopening this case in virtually all aspects. (The court and the parties would also have to consider what implications, if any, this challenge would have for those *Frazer* parties—in particular, plaintiff United States of America—who are not parties to this

litigation, and how those implications would be handled in this litigation.) Plaintiff has offered no excuse whatsoever for not having raised this challenge long before now.

DONE, this the 5th day of June, 2001.

\s\ Myron H. Thompson
MYRON H. THOMPSON
United States District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

[Filed May 8, 2001]

CIVIL ACTION
No. 94-T-154-N

JANELL S. HARPER,

Plaintiff,

v.

STATE OF ALABAMA PERSONNEL BOARD, *et al.*,

Defendants.

JUDGMENT

In accordance with the memorandum opinion entered today, it is the ORDER, JUDGMENT, and DECREE of the court that the motions for summary judgment and for dismissal, filed by defendants on February 28 and March 19, 2001, are granted and this lawsuit is dismissed in its entirety.

It is further ORDERED that costs are taxed against plaintiff, for which execution may issue.

DONE, this the 8th day of May, 2001.

\s\ Myron H. Thompson
MYRON H. THOMPSON
United States District Judge

APPENDIX E

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE
DISTRICT OF, NORTHERN DIVISION

[Filed May 8, 2001]

CIVIL ACTION NO. 94-T-154-N

JANELL S. HARPER,

Plaintiff,

v.

STATE OF ALABAMA PERSONNEL BOARD, *et al.*,

Defendants.

MEMORANDUM OPINION

This lawsuit is now before the court on motions for summary judgment and for dismissal , filed by defendants on February 28 and March 19, 2001. Upon consideration of the motions, the court concludes that they should be granted as follows.

COUNT I

This count, which is brought under the Equal Pay Act of 1963 (EPA), as amended, 29 U. S.C.A. § 206(d); is dismissed in its entirety for two reasons. First, while plaintiff has established a prima facie case under the EPA, defendants are entitled to summary judgment on their affirmative good-faith representation, that plaintiff was paid differently, not because of her sex, but because of the *Frazer,* no-bypass rule, which is "a differential based on [a] factor other than sex." *See* 29 U.S.C.A. § 206(d).[1] The evidence reflects that the State of

[1] Defendants correctly also note that they did not violate the EPA because plaintiff was properly denied a reallocation pursuant to "a merit system." 29 U. S . C .A. § 206(d).

Alabama, in an effort to comply with and enforce the *Frazer* no-bypass rule *see United States v. Frazer*, 317 F.Supp. 1079, 1091 (MD. Ala. 1970) , has consistently followed the policy of refusing to " reallocate" a white parson to a position that would result in the effective "promotion" of that person over a higher ranking African-American on a register; the evidence further reflects that the State simply applied this policy to plaintiff as well. Plaintiff maintains that the State is incorrectly applying the rule to reallocations; however, it is beyond question that, rightly or wrongly, the State has followed the policy in good faith. *See Timmer v Michigan Dept. of Commerce*, 104 F. 3d 833, 843 (6th Cir. 1997) ("an employer's argument that a wage disparity was due to a mistake is a defense within the fourth exception of the [EPA].") . Indeed, because of changed state personnel procedures not contemplated when the *Frazer* no-bypass rule was adopted,. the reach and continued application of the rule are currently being addressed in other litigation. *See Reynolds v. Department of Transportation*, civil action no. 85-T-665-N (M.D. Ala.); *Ex parte: Employment Discrimination Litigation against the State of Alabama*, civil action no. 94-T-356-N (M.D. Ala.); *United States v. Flowers*, civil action no. 68-T-2709-N (M.D. Ala.) (also known as *Frazer or Ballard*).

Second, the individual defendants are not proper defendants in their individual capacities, and are unnecessary defendants in their official capacities.

COUNT II

This count, which is brought under the equal protection clause of the fourteenth amendment to the United States Constitution, as enforced through 42 U.S.C.A. § 1983, is dismissed in its entirety for several reasons. First, while plaintiff has established a prima facie case under fourteenth amendment, plaintiff has not rubutted defendants' good-faith representation that plaintiff was paid differently, not because of her sex, but because of the *Frazer* no-bypass rule, as the

court has explained above. *See Damon v. Fleming Supermarkets*, 196 F.3d 1354, 1361 n. ("An empl.oyer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminaroty conduct."); *Jones v. Bessemer Carrawav Medical Ctr.*, 151 F.34 1321, 1324 n. 16 (11th Cir.1998) (An employer "may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.") (citation and additional quotation marks omitted); *Moore v. Sears, Roebuck and Co.*, 683 F. 2d 1321, 1324 n. 4 (11th Cir. 1982) ("It is wall settled in employment discrimination cases such as this that for an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory and that the asserted reason for the discharge is therefore not a mere pretext for discrimination.").

Second, the eleventh amendment bars this claim as to defendants State Personnel. Board (SPB) and Alabama Department of Economic and Community Affairs (ADECA). *See Pennhurst State School & Host. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984).

Third, the eleventh amendment bars this claim to the extant damages and retroactive relief are sought against the individual defendants in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985); *Jackson v. Georgia Dept. of Trans.*, 16 F.3d 1573, 1575 (11th Cir.), *cert. denied*, 513 U.S. 929, 115 S.Ct. 330 (1994).

And, finally, the individual defendants are entitled to qualified immunity to the extent they are sued in their individual capacities. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982); *Chesser v. Sparks*; ___ F.3d. ___, ___, 2001 WL 392390 (11th Cir. 2001).

COUNT III

This count, which is brought under the Age Discrimination in Employment Act, 29 U.S.C.A. § 601-634, is dismissed in its entirety as to all defendants. *See Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000).

COUNT IV

This count, which is brought under the first amendment to the United States Constitution, as enforced through 42 U.S.C.A. § 1983, is dismissed in its entirety for several reasons. First, the evidence firmly reflects, as stated, that the State of Alabama simply applied to plaintiff its objective policy of applying the *Frazer* no-bypass rule to "reallocations" where the result would be the effective "promotion" of a white person over a higher ranking African-American on a register. Thus, even if one or more defendants harbored a bias against plaintiff based on her association, there simply is no question but that the State refused to reallocate plaintiff pursuant to the *Frazer* no-bypass rule.[2]

Second, the eleventh amendment bars this claim as to SPB and ADECA. *See Pennhurst State School & Hosp. V. Halderman, supra.*

Third, the eleventh amendment bars this claim to the extent damages and retroactive relief are sought against the individual defendants in their official capacities. *See Kentucky v. Graham, supra; Jackson*, 16 F.3d at 575.

And, finally, the individual defendants are entitled to qualified immunity to the extent they are sued in their individual capacities. *Sea Harlow v. Fitzgerald, supra; Chesser*, __ F.3d at __, 2001 WL 392390 at *4-5.

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[2] Plaintiff faults ADECA officials for harboring an association bias against her, but ADECA officials pursued reallocation on her behalf, and it was SPS officials (for whom there is no apparent basis for a discriminatory motive against plaintiff) who refused to reallocate plaintiff.

COUNT V

This count, which is brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. A. §§ 1981a, 2000e through 2000e, 17, is dismissed in its entirety for two reasons. First, while plaintiff his established a prima facie case under Title VII, plaintiff has not rebutted defendants' good-with representation that plaintiff was paid differently, not because of her sex, but because of the *Frazer* no-bypass rule, as the court has explained above.

Second, the individual defendants are not proper defendants in their individual capacities, and are unnecessary defendants in their official, capacities. *See Smith v. Capitol City Club Montgomery*, 850 F.Supp. 976, 978 (M.D. Ala. 1994); *Shows v. Morgan*, 40 F.Supp.2d 1345, 1361-1362 (M.D. Ala. 1999).

Accordingly, this lawsuit is due to be dismissed in its entirety. An appropriate judgment will be entered.

DONE, this the 8th day of May, 2001.

/s/ Myron H. Thompson
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

[Filed Feb 2, 2001]

CIVIL ACTION
No. 94-T-154-N

JANELL S. HARPER,

Plaintiff,

-v.-

STATE OF ALABAMA PERSONNEL BOARD, *et al.*,

Defendants.

ORDER

It is ORDERED that the plaintiff's motion for summary judgment, filed May 5, 1999, is denied.

Some of the plaintiff's claims—for example, her Title VII, first amendment, and fourteenth amendment claims—raise factual issues unrelated to the *Frazer* 'no-bypass rule' that cannot be resolved in her favor on the limited record. This does not mean, however, that these claims would survive defendants' summary-judgment motions; indeed, some of her claims—for example, her first amendment and fourteenth amendment claims—are barred in part, at least, by the eleventh amendment to the extent she has sued state agencies at all and to the extent she seeks damages from state officials in their official capacities. And to the extent the no-bypass rule is implicated—for example, by plaintiff's Equal Pay Act claim—this issue, as the court has previously indicated, needs to be addressed in *Frazer*, where all parties to that litigation can be heard. As to the instant litigation, all the other

concerns just identified (that is, those that do not turn on the application of the no-bypass rule) are best raised by defendants in their own summary-judgment motions.

Accordingly, it is ORDERED that the parties are allowed until February 28, 2001, to file dispositive motions.

The clerk of the court is DIRECTED to provide a copy of this order to counsel for all parties by facsimile transmittal.

DONE, this the 2nd day of February, 2001.

\s\ Myron H. Thompson
MYRON H. THOMPSON
United States District Judge

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Jan. 31, 2001]

Civil Action No. 94-T-154-N

JANELL S. HARPER,

Plaintiff,

v.

STATE OF ALABAMA PERSONNEL BOARD, *et al.*,

Defendants.

ORDER

It is ORDERED that the motion for summary judgment or, in the alternative, motion to recast defendants as Rule 19 parties, filed by the Personnel Board defendants on February 6, 1995, is denied *without prejudice*. The court believes that, because the issue (the application of the 'no-bypass rule' to ('allocations') is very important to the application of *Frazer* in the state system and because the *Frazer* court has recently issued two orders restricting the reach of the 'no-bypass rule,' *see United States v. Flowers*, civil action no. 2709-N (M.D. ala. December 14, 2000) (Doc. no. 4460); *United States v. Ballard*, civil action no, 2709-N, 1998 WL 1748544 (M.D. Ala. April 24, 1999) (Doc. no. 2609), the Personnel Board defendants should first present their defense to the court in the *Frazer* litigation where all the parties to that litigation can be heard on the important issue.

The clerk of the court is DIRECTED to provide a copy of this order to counsel for all parties by facsimile transmittal.

DONE, this the 31st day of January, 2001.

/s/ Myron H. Thompson
MYRON H. THOMPSON
UNITED STAES DISTRICT JUDGE

APPENDIX H

UNITED STATES v. FRAZER, 317 F, Supp. 1079, 1091(M.D. Ala. 1970); stated the so-called Frazer "no-bypass"rule as follows:

> "Defendants shall not appoint or offer a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher ranked Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is other wise unfit for it, or is unavailable."

(R1-17-5).

AMENDMENT NO. XIV, SECTION 1
UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT NO. I
UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

29 U.S.C. §206(d)(1)

(d) Prohibition of sex discrimination (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

42 U.S.C. § 1983

Section 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of

this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000e-2

Section 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.